

COMMENT

MISTRETTA AND METAPHOR

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Mark Tushnet brings the art of metaphor to his analysis of separation of powers doctrines. His view, briefly stated, is that judges use what he calls a "functional" analysis when they want to uphold a statute on separation of powers grounds, and a "formalist" analysis when they want to strike down a statute. According to Professor Tushnet, functionalists analyze a statute's actual effects; they examine whether a statute employs sensible methods, whether the statutory organization promotes the general welfare, and whether the statutory scheme substantially alters the balance of power among the branches. Formalists, on the other hand, are more abstract. They first formulate a definition of a statute's tasks, then ask whether those tasks fit into legislative, executive, or adjudicatory categories. Depending upon how the statute's tasks are characterized, formalists may then determine whether Congress has illegally granted powers to one of the branches not authorized to so act.¹

Before exploring how Professor Tushnet relates his thesis to the Court's decision in *Mistretta v. United States*,² one needs to understand the changes wrought by the 1984 legislation³ under attack in that case as unconstitutionally violating the separation of powers doctrine as well as other constitutional provisions. As Professor Tushnet recognizes, that

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1. Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 584 (1992).

2. 488 U.S. 361 (1989).

3. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

statute works two major departures from past federal sentencing practice, each of which increases the prosecutors' power and correspondingly reduces the judges' power. First, the guideline system allows the prosecutors' charging decisions to control the sentence and leaves judges with almost no power to intervene.⁴ Second, the sentencing system is now almost entirely front-loaded, meaning that once a sentence is pronounced, it cannot be changed unless a mistake has been made at the time of sentencing in applying the guidelines,⁵ a prosecutor asks for a reduction in time as payment to a prisoner for cooperation,⁶ or the Federal Bureau of Prisons requests a reduction because of a prisoner's severe illness.⁷

The former statutory scheme distributed power to sentence not only horizontally among the three branches, but also longitudinally among several agencies within the executive branch. Congress defined crimes, set punishment levels, and typically left sentencing judges with wide discretion to set minimum and maximum terms within the statutory limits.⁸ Police then, as now, had wide discretion about whom to arrest, how to describe the conduct in question, and how much pressure to put on prosecutors to charge particular crimes.⁹ Prosecutors had complete freedom in deciding which crime to charge, but they had little control over what sentences judges would impose after conviction. Most plea bargaining with prosecutors involved dropping counts to limit sentencing exposure.¹⁰ After conviction, the defendant would meet with a probation

4. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea For Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991).

5. 18 U.S.C. § 3742 (1988); *Williams v. United States*, 112 S. Ct. 1112, 1117 (1992).

6. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (1992) [hereinafter U.S.S.G.]; *Wade v. United States*, 112 S. Ct. 1840, 1842 (1992).

7. Under the guidelines, the Bureau of Prisons uses 28 U.S.C. § 3582(c) (1988) to request a reduction of sentence for a severely ill inmate.

8. Moreover, from time to time Congress specifies minimum sentences for various crimes. This habit has increased over time and has persisted into the guideline era. For example, in 1970 there was no minimum sentence for a person with one prior conviction who was convicted for possession of 100 or more grams of heroin with intent to manufacture, distribute, or dispense. Controlled Substances Act, Pub. L. No. 91-513, § 401, 84 Stat. 1242, 1260-61 (1970). By 1988 the same person, convicted for possession of between 100 and 999 grams of heroin, would receive a minimum sentence of 10 years. 21 U.S.C. § 841 (1988). Similarly, in 1970 there was no minimum sentence for a person with one prior conviction who was convicted of possession of 500 grams of PCP with intent to manufacture, distribute, or dispense. § 401, 84 Stat. at 1260-61. In 1988, the minimum sentence for a person with one prior conviction who was convicted for possession of between 10 and 99 grams of pure PCP (or between 100 and 999 grams of a mixture) was 10 years. 21 U.S.C. § 841 (1988).

9. Mandatory minimum sentences are basically inconsistent with sentencing guidelines. Alschuler, *supra* note 4, at 937.

10. A typical bargain would be a plea to one count, say mail fraud (maximum sentence of five years under 18 U.S.C. § 1341), in return for dropping four or five other counts of mail fraud which,

officer, whose report went to the judge. These presentence reports varied widely in form and content, depending upon the probation officer's personality, experience, and training, and upon local practice.¹¹ The judge would read the presentence report, hold a short hearing at which the prosecutor, defense lawyer, and (sometimes) the defendant spoke,¹² and then impose a sentence somewhere within the limits set by Congress for the particular crime of conviction.

Unlike the current system, in which sentencing is essentially a one-shot deal, the sentencing process was composed of several steps and was far from over after the judge had spoken. First, there was the possibility of a reduction in sentence by the sentencing judge. Upon motion made within 120 days after sentencing, or after an appeal or request for certiorari was denied, the sentencing judge could reduce the sentence. The judge was not required to give reasons either for sentencing or for reductions in sentence.¹³

After sentencing, the defendant was remanded to the custody of the Attorney General—custody regulated quite differently from now. "Good time" reductions, granted under statutory authority,¹⁴ could reduce a sentence by nearly half. For example, a ten-year sentence meant that a prisoner would actually serve about five years and eleven months, assuming that the prisoner earned all of the good time possible. Because the Bureau of Prisons exercised control over good time—withholding it or taking it away for disciplinary violations, as well as granting extra

upon conviction, could result in a greatly increased sentence if the judge decided to impose consecutive sentences for each count. Some bargains included a promise by a prosecutor to recommend a certain sentence or to remain silent at sentencing. This capsule description does not capture the infinite variety of tactics used by prosecutors and defense lawyers in dealing for time. Defense lawyers strove to avoid prosecution altogether, to trade information for leniency, and to lock in sentencing bargains by binding the judge to the bargain, which was possible but not widely done under rule 11. FED. R. CRIM. P. 11(e)(1)(A), (C). For good descriptions of the plea bargaining process, see KENNETH MANN, *DEFENDING WHITE COLLAR CRIME* 10, 14-16 (1985), and MILTON HEUMANN, *PLEA BARGAINING passim* (1977).

11. MARVIN E. FRANKEL, *CRIMINAL SENTENCES* 26-38 (1973).

12. The defendant had (and still has) an absolute right of allocution. FED. R. CRIM. P. 32; *United States v. Laverne*, 963 F.2d 235, 236 (9th Cir. 1992). Often defendants waive this right or say only a few words.

13. Judges' failure to articulate reasons was, of course, one of the reasons that proponents of the guidelines (who could point to many instances of wildly disproportionate sentences) gave when arguing for sentencing reform. See PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM* 2-3 (1977); FRANKEL, *supra* note 11, at 108-11.

14. 18 U.S.C. §§ 4161-4162 (1948), *repealed by* Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

good time for superior work—the Bureau had significant power over the actual length of a sentence.

Parole was yet another component of sentencing. The U.S. Parole Commission had authority to release a prisoner (with specified limitations or “conditions” on liberty) either immediately, in certain circumstances,¹⁵ or, more commonly, after the prisoner had served a minimum of one third of the sentence originally imposed.¹⁶ If a prisoner, once released, violated the conditions of parole, he or she could be “violated” and by the Parole Commission required to serve the remainder of the term originally set by the judge.¹⁷ In the early 1970s, the Commission began deliberately structuring its “decisionmaking” by using guidelines to take into account and to counteract, when possible, the disparities introduced into the system by judges.¹⁸

Thus, in the former system, discretion was widely shared by the three branches. Each branch had significant power to influence the terms and conditions of a particular sentence, and both the judicial and the executive branches had the power to act not just at the initial pronouncement of sentence, but also over time. Judges had wide discretion, but always within limits set in the beginning by law enforcement agents and prosecutors, and at the end by the Parole Commission.¹⁹ Congress set

15. 18 U.S.C. § 4205(b)(2) (1976) allowed the Parole Commission to release the prisoner on parole “at such time as the Commission may determine.” *Repealed by* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 2027 (1984).

16. 18 U.S.C. § 4205(a) (1976) provided that when serving a term of more than one year, “a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years.” *Repealed by* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 2027 (1984).

17. 18 U.S.C. §§ 4213-4214 (1976), *repealed by* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 2027 (1984).

18. William J. Genego, Peter D. Goldberger & Vicki C. Jackson, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 822-23 (1975). It is ironic that Congress overstated the inadequacies of the Parole Commission’s procedures and philosophy when it abolished parole and adopted the guideline system. In *Mistretta*, the Court cited a congressional report that concluded that the parole system was unable to deal with judicial sentencing disparity and that decried the uncertainty about the amount of time an offender would actually spend in prison. The report also stated that the Commission’s guidelines did not deal with the sophistication of the offense nor the role that an offender played in a group offense. Both statements were in error. *See id.* at 823-24 (explaining that the Parole Board’s guideline table scored inmates in part on “Offense Severity”). In fact, the then-Parole Commission’s guidelines actually were the precursors of the sentencing guidelines, which are constructed according to the very same theories.

19. There is yet another sentencing process—the pardon power of the executive, which is used either to pardon outright or to commute sentences. Potentially a valuable tool for reducing disparities and for controlling prison population, this power has been used so infrequently in recent years that as a practical matter it is virtually a dead letter. Records from the Office of the Pardon Attorney of the U.S. Department of Justice show only 32 commutations of sentences since fiscal year 1980. Pardons *after* completion of sentence are more common.

upper and lower limits but left individual decisions to the other branches. The executive could choose which crimes to charge, make recommendations about sentencing, exercise discretion in deciding when to release a prisoner eligible for parole, and control the length of the sentence through grant or denial of good-time credits.

Today's sentencing system is starkly different from the one in effect five years ago.²⁰ Parole has been abolished. Reduction of a sentence for good time has been cut back sharply, to about fifteen percent of the sentence.²¹ The shift to a guideline system has caused most of the discretion formerly held by judges to flow to the executive. And within the executive branch, the front-loading of this increased discretion has left prosecutors and law enforcement agents as the main beneficiaries.²² Only Congress retains roughly the same amount of power as before—that is because Congress still defines what conduct is criminal and sets maximum and minimum punishments for crimes.²³

Judges cannot easily make decisions outside the narrowly prescribed guideline range.²⁴ Even credit for cooperation with law enforcement officials is controlled by prosecutors.²⁵ Federal Rule of Criminal Procedure 35, which formerly allowed judges to reduce sentences after imposition,

20. Although the legislation was passed in 1984, it did not become effective until November 1987. § 235(a)(1), 98 Stat. at 1987.

21. 18 U.S.C. § 3624(b) (1988).

22. Undercover law enforcement agents can enhance sentences under the guidelines by manipulating such factors as the amount or type of drugs involved in the transaction, whether firearms are involved in the offense, and whether the deal takes place near a school. Saul M. Pilchen, *The Federal Sentencing Guidelines and Undercover Sting Operations: A Defense Perspective*, 4 FED. SENTENCING REP. 115, 115 (1991).

23. Congress has shown a heavy hand in both areas. It has increased the use of minimum sentences. See *supra* note 8. Congress has also expanded the types of conduct considered to be criminal. For example, distributing narcotics in or near schools, 21 U.S.C. § 860 (1988), and to pregnant women, 21 U.S.C. § 861 (1988), carry increased penalties.

24. Judges are especially limited in their ability to depart downward. The *Guidelines Manual* allows departures downward in cases of substantial assistance to authorities (only upon motion of the prosecutor), U.S.S.G., *supra* note 6, § 5K1.1; mitigating circumstances not adequately taken into consideration by the Sentencing Commission, § 5K2.0; victim's wrongful or contributing conduct, § 5K2.10; committing a lesser harm to avoid a greater harm, § 5K2.11; coercion and duress, § 5K2.12; diminished capacity, § 5K2.13; and voluntary disclosure of offense, § 5K2.16. Opportunities for judges to depart upward are more available: aggravating circumstances not adequately taken into consideration by the Sentencing Commission, § 5K2.0; death, § 5K2.1; physical injury, § 5K2.2; extreme psychological injury, § 5K2.3; abduction or unlawful restraint, § 5K2.4; property damage or loss, § 5K2.5; weapons and dangerous instrumentalities, § 5K2.6; disruption of government function, § 5K2.7; extreme conduct, § 5K2.8; criminal purpose, § 5K2.9; endangering of public welfare, § 5K2.14; and terrorism, § 5K2.15.

25. See *supra* note 6.

has been abolished.²⁶ One of the statutory innovations was to permit prosecutors as well as defendants to appeal sentences,²⁷ and appeals indeed have been frequent.²⁸ Grounds for appeal are narrow, however, and usually focus only upon whether the judge has applied the guidelines correctly.²⁹

In short, the 1984 legislation was a watershed in the world of sentencing and profoundly changed both the allocation of sentencing powers and the time frame in which sentencing occurs. How are such changes measured in separation of powers theory? Professor Tushnet posits that three metaphorical worldviews of the Constitution and of the political system of the United States affect judicial understanding of separation of powers problems. The first, the "delicate balance" or "mountain peak," sees our political system as poised at the top of a mountain, so that the slightest push will send it to the bottom. This view could encourage a formalism that would readily negate legislative decisions on separation of powers grounds. If envisioning a delicate balance, judges need not know much about the actual effects of a statutory scheme to invalidate it; all judges need fear is change, which could and probably would lead to disaster.³⁰

The second metaphor Professor Tushnet deploys is the "bowl"—a homeostatic system that returns to an equilibrium either at a former point or (if the bowl has bumps on the bottom) a point nearby. Both functionalists and formalists can be comfortable with this image. As Professor Tushnet writes, "Whatever the approach, the underlying thought would be that nothing much was likely to result from the innovation."³¹ The only danger is that a change will push the system over the lip of the bowl, and such a drastic effect is perceived to be unlikely.

The third and most complicated metaphor is the "plateau with depressions"; like the second metaphor, it is a "crude" rather than a "delicate" balance. Under this vision, our system is always in a depression upon the plateau; changes shift us from one depression to another on

26. The new Federal Rule of Criminal Procedure 35 allows a court to correct only a sentence determined on appeal to have been imposed in violation of the law. On motion of the government, the court may also reduce a sentence for the defendant's subsequent assistance in another investigation or prosecution. FED. R. CRIM. P. 35.

27. 18 U.S.C. § 3742 (1988).

28. Appellate courts already have reviewed several thousand cases dealing with the guidelines. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1691-92 (1992).

29. 18 U.S.C. § 3742 (1988).

30. Tushnet, *supra* note 1, at 597.

31. *Id.* at 598.

the plateau—which is no big deal unless we are near the edge of the precipice itself. The problem is that from our current sunken position, we cannot tell how close we are to the edge. Formalists conclude that we might be near enough to the edge that rigid adherence to former allocation of power is necessary.³² Functionalists implicitly are more comfortable, either visualizing a plateau with a large area or trusting in their analyses to let them know when the edge is near.

Professor Tushnet's insight, drawn from these metaphors, is that the functionalist's analysis comes to resemble formalism for two reasons. First, under either the homeostatic ("bowl") or the plateau view,³³ functionalists tend to believe that short-run shifts in the balance of power will even out in the long run and return the system to its original position, or somewhere near it. Second, judges, as generalists, are not capable of acquiring and processing information that would allow them to predict accurately the effects of legislation. Both of these reasons in turn suggest that functionalists tend to ignore evidence of the actual effects of legislation—just as formalists do automatically when they concentrate only upon rigid task classifications.³⁴ However, despite his view that the two modes of analysis collapse onto each other, Professor Tushnet ends up opting for functionalism, on the quite reasonable ground that he refuses to accept the formalists' invitation to "stop thinking after we have looked at the statute and the Constitution."³⁵ Professor Tushnet prefers to employ a method of interpreting the Constitution that induces more deliberation about the value of institutional innovations.³⁶

What does all this have to do with *Mistretta*? Professor Tushnet's answer is that the *Mistretta* decision illustrates the Court's reliance on

32. *Id.* at 599. Prof. Tushnet is unclear about whether judges subscribe to these metaphoric images before they decide cases or whether the decision precedes the metaphor. Nor is Prof. Tushnet clear about the precise relationship between the metaphoric visions and the mode of analysis adopted (formalistic or functionalistic), though it would be fair to infer that hard-wired formalists (if there are such persons) subscribe to the mountain-peak metaphor. His statement that judges use functional analysis when they want to uphold a statute and formalist analysis when they want to strike down a statute suggests that the choice of method comes after a decision is made on other grounds and also that the same judge (or panel of judges) might use either method depending on the predetermined result. In other words, rather than judges being a priori either functionalists or formalists, judges may switch modes of decision making depending on what outcome they want to reach.

33. Prof. Tushnet implicitly assumes that the bowl and plateau metaphors are the ones most widely used by functionalists. This assumption seems to be right, but only if we make the further assumption that judges embrace the metaphorical images before, not after, they reach decisions. Otherwise, the metaphors are only makeweights and are not internalized by any judges.

34. Tushnet, *supra* note 1, at 603.

35. *Id.* at 605.

36. *Id.*

the "crude balance" (bowl and plateau) metaphors. First, given that the legislation under consideration set up a structure that imposed significant changes on the sentencing system, the Court saw any effect of the makeup and location of the Sentencing Commission, which were the primary subjects of the Court's discussion, as likely to be minimal.³⁷ Second, the Court was probably relying upon homeostatic pressures that it assumed would restore the former equilibrium, and did not believe that the reallocation of power in the sentencing legislation would push the system over the lip of the bowl or off the edge of the plateau.³⁸

I wonder. Another explanation comes to mind. Perhaps the *Mistretta* Court sought to stake a claim of significant if not primary judicial involvement in the sentencing process, but as will be detailed below, it had difficulty making that claim directly. According to Professor Tushnet, "In *Mistretta* . . . the only real question for a functional analysis is whether the courts can control prosecutors' exercises of discretion affecting sentencing."³⁹ The issue of unchecked executive branch power is, indeed, a serious and fundamental question. I prefer to frame a related but different question: Has the legislation impermissibly altered the balance of power among all three branches by giving the executive branch too much power and concentrating that power so as to front-load and shorten the sentencing process?⁴⁰ Either of the two questions would call for a searching investigation of the effects of the entire statute.

But the Court, at least on the surface, considered neither question. In addressing issues involving separation of powers doctrine, the Court did not consider the effects of the actual legislation, as set forth by Congress and implemented by the Sentencing Commission, prosecutors, and the courts. Rather, the Court considered only (a) the propriety of locating the Sentencing Commission in the judicial branch;⁴¹ (b) whether the composition of the Commission impermissibly required judges to share their power with nonjudges;⁴² and (c) whether the presidential power to appoint judges to the Sentencing Commission intruded too much upon

37. *Id.* at 602.

38. *Id.*

39. *Id.* at 591.

40. *Id.* at 583 n. 6. I prefer this formulation because it emphasizes that Congress, as well as the judiciary, has a role in controlling the executive branch.

41. *Mistretta v. United States*, 488 U.S. 361, 384-97 (1989).

42. *Id.* at 397-408.

judicial independence.⁴³ These concerns seem both formalistic and trivial. Given the wholesale changes produced in the sentencing process by the 1986 legislation, the composition and location of the Sentencing Commission seem almost beside the point, in part because the statute, coupled with mandatory minimum sentencing laws, effectively structures the guidelines and limits the area in which the Sentencing Commission has authority.⁴⁴ Given these legislative innovations, it is plain that the statute itself, and not the composition or placement of the Sentencing Commission, operates to alter significantly the balance of power in the sentencing process, with the executive, namely police and prosecutors, emerging as the big gainer and the judiciary as the big loser.

Given that the central "reforms" of the statute dwarf the role and limit the powers of the Sentencing Commission, the mystery of *Mistretta* is why the Court seemed to labor so greatly over its decision on the powers of the Sentencing Commission. My view is that the Court's struggle arose not so much from the problems caused by the Sentencing Commission's location in the judicial branch or by judges' having to share power with nonjudges, but from the realization that any claim of right by the

43. *Id.* at 408-11. These were the questions presented on appeal.

44. For example, the statute specifically instructs the Commission how to construct the guidelines. For guideline sentencing ranges, the Commission is told that the maximum of the range established for the term of imprisonment shall not exceed the minimum of the range by more than 25% or six months, whichever is greater (except if the minimum term is 30 years or more, in which case the maximum may be life imprisonment). 28 U.S.C. § 994(b)(2) (1988). The Commission, in establishing guideline categories, is instructed to take into account the grade of the offense, the aggravating or mitigating circumstances under which the offense was committed, the harm caused by the offense, the community's and the public's view of the offense, the deterrent effect a sentence might have, and the current incidence of the offense in the community and the nation. § 994(c). In establishing categories of defendants for use in guidelines and policy statements governing probation, fines, supervised release, and imprisonment, the Commission is instructed that it may take into account the defendant's age; education; vocational skills; mental, emotional, and physical condition; previous employment record; family ties and responsibilities; community ties; role in the offense; criminal history; and the degree of dependence upon criminal activity for livelihood, if these factors are determined to be relevant to the nature, extent, place of service, or other incidents of an appropriate sentence. § 994(d). The Commission is also instructed, however, that the guidelines should not take into account the education, vocational skills, employment record, family ties and responsibilities, or community ties of the defendant in specifying a term or length of imprisonment. § 994(e). The Commission is instructed to formulate the guidelines to minimize the likelihood that the prison population will exceed capacity. § 994(g). In specifying terms of imprisonment for violent felonies or certain drug offenses committed by defendants convicted twice before of similar crimes, the Commission must specify a term at or near the maximum authorized. § 994(b). The Commission is also instructed to specify substantial terms for other categories of defendants. § 994(i). Statutory instructions stress the importance of leniency for first-time offenders and of imprisonment for crimes involving serious bodily injury or death. § 994(j). The instructions reject rehabilitation as a reason for imprisonment, call for incremental penalties for certain offenses, and specify when sentences can be imposed consecutively. § 994(f). Guidelines are not to be bound by current sentences, § 994(m), and a defendant may be rewarded for substantial assistance. § 994(n).

judiciary to any role in sentencing is itself tenuous. If the Court had fully addressed the statutory "reforms," it could not have avoided confronting the question of what quantum of power judges must have in the sentencing process, and *where* that power comes from.

The answers to these questions would probably not be comforting to advocates of judicial power. Professor Tushnet gives an example:

Suppose that instead of creating the Sentencing Commission, Congress had prescribed mandatory sentences for every offense, allowing for no judicial deviation whatsoever, but had continued to allow parole at the discretion of a parole board lodged in the executive branch. Although Congress would thereby have shifted power from the judiciary to the executive, it is hard to see how a serious constitutional challenge could have been mounted.⁴⁵

Suppose further that Congress had simply mandated specific sentences for each crime, with added penalties for recidivists and no discretion to deviate. Subtract the limited discretion now afforded sentencing judges, and such a scheme would be very similar to the one mandated by the current statute. Could there be a successful constitutional challenge? Implicitly in Professor Tushnet's view, probably not.

We think of judges as very powerful actors in the sentencing process, and for many years they have been. But it has not always been so.⁴⁶ Moreover, many states in recent years have adopted sentencing guidelines that operate to reduce judicial input, sometimes drastically, into the sentencing process. These developments suggest that neither common law nor constitutional doctrine apportions sentencing authority specifically to judges. Further, recent scholarship has cast doubt on whether any particular role remains reserved for judges in the sentencing process.⁴⁷ The uneasiness manifest in the *Mistretta* opinion stems from the realization—deliberately unstated—that judges could be completely removed from the process without raising separation of powers problems.⁴⁸ I believe this is the reason the Court went to such lengths to

45. Tushnet, *supra* note 1, at 589-90 (footnote omitted).

46. *United States v. Grayson*, 438 U.S. 41, 45 (1978) ("In the early days of the Republic . . . the period of incarceration was generally prescribed with specificity by the legislature."); *United States v. Hudson & Goodwin*, 11 U.S. (1 Cranch) 32, 34 (1812) (stating that judges had no power to punish anyone until the legislature "first made an act a crime" and "affix[ed] a punishment to it").

47. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1313-15 (1988) ("Sentencing cannot be considered inherently judicial."); Lewis J. Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1387 (1987) ("The specification of sentencing ranges has never been considered an inherent judicial function like the promulgation of court rules.").

48. Tushnet, *supra* note 1, at 590.

emphasize the historic role of judges and to extol their expertise, while grudgingly accepting the congressional scheme.

As Justice Blackmun wrote for all but Justice Scalia:

For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case. Indeed, the legislative history of the Act makes clear that Congress' decision to place the Commission within the Judicial Branch reflected Congress' "strong feeling" that sentencing has been and should remain "primarily a judicial function". . . . That Congress should vest such rulemaking in the Judicial Branch, far from being "incongruous" or vesting within the Judiciary responsibilities that more appropriately belong to another Branch, simply acknowledges the role that the Judiciary always has played, and continues to play, in sentencing.⁴⁹

The footnote that appeared at the end of the last sentence is telling and bears repeating: "Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional question whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."⁵⁰ The opinion went on to extol the qualifications of judges in sentencing:

As already noted, sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment. . . . Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise. . . . [S]ubstantive judgment in the field of sentencing has been and remains appropriate in the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch.⁵¹

Mistretta, then, can be taken as primarily a political statement to serve notice on Congress that the Court was concerned about the distribution of power within the sentencing process, even though the Court was unwilling or unable at that time to claim a particular role for judges. As consolation, the Court might also, in Professor Tushnet's terms, have believed that the plateau-with-depressions metaphor describes the overall situation, and that the normal give-and-take of the actors in the system will cause the system to return sometime in the future to a position where

49. *Mistretta v. United States*, 488 U.S. 361, 390-91 (1988).

50. *Id.* at 390.

51. *Id.* at 396-97.

discretion will be more evenly distributed, with the prosecutorial power less dominant and judges regaining significant authority.

I believe we are closer to the edge than the *Mistretta* opinion acknowledges. The edge here represents not only the erosion of separation of powers; over the edge lie significant losses of liberty. My principal objections to the guidelines are twofold: that no adequate mechanisms exist by which to correct sentencing mistakes, either individual or aggregate,⁵² and that the redistribution of power has increased the likelihood of unduly prolonged incarceration. Unduly long sentences are horrible for those who must serve them; moreover, the longer sentences imposed on an ever-increasing prison population will create a significant class of prison-adapted, infantilized, asocial individuals who will cause considerable trouble when they are at last released.⁵³

The imbalance of power in the system, exemplified by the dominance of prosecutors in setting prison terms, at once causes and exacerbates these problems. The primary job of prosecutors is to charge, convict, and (now) select a sentence. Prosecutors, as a rule and by virtue of their primary-role definition, are less involved in issues of overall system fairness than are parole board members, who for example see a broad aggregate picture of all convicted felons, or judges, who hear complaints about unfair treatment from defendants as they move through all parts of the system—pretrial to prison and beyond. It is the differences in role that make me, in Professor Tuslinet's terms, a functionalist and that prompt me to want to respond to the question the Court left unaddressed: why judges *should* have a greater role in sentencing than is currently allocated.

First, unlike prosecutors (who, in essence, hold the power to sentence), judges are supposed to be impartial. Despite the cynical view

52. The Commission's retroactivity policy, U.S.S.G., *supra* note 6, § 1B1.10, may allow a reduction in an inmate's term under 18 U.S.C. § 3582(c)(2) (1988) if, while he or she is imprisoned, the guideline range applicable to his or her offense is lowered by amendment. Reductions may be considered only if certain guidelines have been amended. U.S.S.G., *supra* note 6, § 1B1.10(d). In determining whether a reduction is warranted, the court must consider the sentence as it would have been imposed under the amended guidelines. *Id.* § 1B1.10(b). Reductions may not exceed the number of months by which the maximum of the guideline range applicable to the defendant has been lowered. *Id.* § 1B1.10(c).

53. Under the guidelines, the length of prison sentences has increased in many sentence categories. Sentences for robbery are 85% longer under the new law, with the average time served now 83.1 months, as opposed to 44.8 months under the old law. Drug offenders now average 64.3-month sentences, compared with only 23.1 months before the guidelines went into effect. That is an increase of 178%. J. Michael Quinlan, *Intermediate Punishments as Sentencing Options*, 66 S. CAL. L. REV. 217, 219 (1992). These increases have exacerbated prison overpopulation. The current federal prison population is more than 66,000 inmates, or 148% of capacity. *Id.* at 218 & n.2.

(and the surface appearance in many cases) that judges favor the prosecution, judges are at the very least likely to be more evenhanded than prosecutors, and thus they tend to make fairer sentencing decisions.⁵⁴ Second, judges tend to be older and have more life experience than prosecutors, especially in the federal system, where prosecutors tend to spend only their early practice years before entering private practice. This age and experience differential does not, of course, guarantee fairer sentences—but experience should at least in many cases contribute to a balanced viewpoint. Third, and importantly, judges actually come into contact with the individuals to be sentenced and have the opportunity to evaluate them in a more immediate way than does a Sentencing Commission, which must perforce deal with aggregates, or prosecutors, who by definition focus on defendants as *cnlprits*. Of course, it was the way that judges dealt with individual cases in the past that led to the adoption of the guidelines. Judges operated within large sentencing spreads⁵⁵ and did not have to give reasons for their sentences, and very limited avenues for appeal of sentences existed.⁵⁶ Horror stories abounded.⁵⁷ But the guidelines system now in effect goes too far in the opposite direction. Judges are extremely limited in deviating from prescribed guideline ranges—ranges that capture a wide variety of different types of people within their borders.⁵⁸ Without the opportunity for departure, and with almost unbridled prosecutorial discretion, horror stories again abound.⁵⁹

54. This point could be used by those challenging the statutory scheme on due process grounds.

55. For example, former 18 U.S.C. § 2113(a) provided that persons convicted of bank robbery could be fined not more than \$5000, imprisoned not more than 20 years, or both. Before the sentencing guidelines, a judge could thus sentence a person convicted under this statute to probation, 20 years, or anything in between.

56. A sentence imposed within statutory limits was generally not subject to review, with narrow exceptions. *United States v. Tucker*, 404 U.S. 443, 447 (1972) (sentence based on misinformation about a defendant's prior criminal record was subject to review); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (defendant denied due process of law by sentence based on misinformation about prior criminal record).

57. See O'DONNELL, CHURGIN & CURTIS, *supra* note 13, at 1-14 (demonstrating the sentencing disparity of the period through statistical analysis).

58. For example, the Commission was instructed by Congress to ensure that the guidelines reflect the "general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties" of a defendant. 28 U.S.C. § 994(e) (1988).

59. *Alschuler*, *supra* note 4, at 921-22 (describing a drug runner guilty of selling two vials of crack being sentenced to at least 63 months because the court, in calculating the total quantity of crack sold, added the weight of his supplier's 586 vials as part of the same course of conduct); Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2 (citing *Chapman v. United States*, 113 S. Ct. 334 (1992) (upholding guideline measurement that allows sentences for selling LSD to vary greatly depending not on the drug quantity but on the weight of the carrier's medium of choice, for example, blotter paper (light) or snugar cubes (heavier))).

Some middle ground must be found. We need a common law of sentencing, based on a guideline system that is not rigid and inflexible. Judges should be required to give reasons for their sentences, but they should also be allowed to depart from guideline ranges based on their evaluation of individual defendants. Appeals must be afforded, and ways should exist to correct sentences even long after appeal if we become convinced that particular sentences, or aggregates of sentences, are too harsh or are otherwise unfair. That common law could be developed from a constitutional theory that argues, either as a matter of separation of powers or due process, for a role for the judiciary in sentencing. As the *Mistretta* Court took pains to indicate, such an argument could flow from the obvious inequity of combining the prosecution and sentencing functions in one branch, the executive.

And so back to Professor Tushnet's two modes of decision, functionalism and formalism, and three metaphors, mountain peak, bowl, and plateau—all offered to explain how courts decide separation of powers issues. I believe that Professor Tushnet's theory that functionalism and formalism are closely related is borne out by the failure of the Court to consider fully the effects of the whole statute (functionalist judges cannot assimilate complex data very well, so they tend to ignore them, just as formalists do automatically). In addition, the Court used both functionalist and formalist analyses in the same opinion. If we agree that the decision about the location and composition of the Sentencing Commission is functionalist, why the emphasis and insistence in the opinion upon the historical powers and expertise of judges in the sentencing process? Surely the claims of a role for judges, without analysis of how the statute affects that role, have a formalist cast. The Court was sending a (formal) message to Congress, hoping to preserve a substantial role for judges in sentencing. The message was, "Don't go any farther down this road. Judges are important and necessary participants in the sentencing process, and even now too much power may be in the hands of the executive." I hope that this message is heeded. Introduction of properly limited judicial discretion in sentencing is, in my view, the best way to restore the "homeostatic balance" among the branches so that we can approach, if not reach, a just and impartial sentencing system.